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No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SS. *MONROSA*, her engines, tackle, etc., and
NAVIGAZIONE ALTA ITALIA,
Petitioners,

versus

CARBON BLACK EXPORT, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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CARBON BLACK EXPORT, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

Questions Presented.

I. Is a clause inserted by an Italian shipowner in an ocean bill of lading issued at a United States port and which provides for legal proceedings in the courts of Genoa exclusively, valid and enforceable against a United States citizen?

II. Does the claimed prohibition of legal proceedings against "the Captain or Shipowners or their Agents," as set forth in Clause 27 of the bill of lading prepared by an Italian shipowner, include an action *in rem* against the offending vessel?

Statement of the Case.

This case involves the right of an American citizen to sue an Italian vessel and her Italian shipowner in United States courts for damage sustained by cargo loaded in the United States and destined for foreign ports.

The respondent herein, Carbon Black Export, Inc., is a domestic corporation organized under the laws of Delaware with its principal place of business in New York City (R. 2, 29). One of its main activities is the manufacture and production of carbon black.

Navigazione Alta Italia is an Italian corporation and has its main office in Genoa, Italy (R. 3, 29). It is a common carrier of merchandise by water for hire and owns and operates a fleet of vessels, all flying the Italian flag, one of which is called the SS. *Monrosa* (R. 3, 29). These vessels maintain scheduled runs between the Gulf ports of the United States and Italian and other Mediterranean ports (R. 29). To handle its business in Houston, Texas, this carrier designated as its general agent Texas Transport & Terminal Co., Inc. (R. 17, 29), which maintains an office in the Cotton Exchange Building, Houston, Texas.

In December, 1955, Carbon Black Export, Inc. prepared 29,299 bags of carbon black for overseas shipment (R. 3, 4). Navigazione Alta Italia was engaged as the carrier and it designated the SS. *Monrosa* as the carrying vessel (R. 3).

The cargo was delivered to the carrier at Houston, Texas (12,060 bags) and at New Orleans, Louisiana (17,239 bags) (R. 3, 4, 29).

On final loading of the carbon black on the SS. *Monrosa,* the shipowner executed 27 of its printed bills of lading and delivered them to the shipper. All of these documents are similar and one has been made part of the record (R. 11-28).

The cargo was in good order and condition on loading (R. 3, 4) and was to be safely carried and discharged in the same condition at Genoa, Venice and Trieste, Italy (R. 4, 5). However, during the voyage sea water entered the No. 5 hold of the vessel, came into contact with part of the carbon black causing extensive damage (R. 31). It is the contention of the respondent that the loss resulted from the unseaworthy condition of the vessel at the commencement of the voyage, i.e., when it left Houston, Texas, and New Orleans, Louisiana. This will be one of the main issues on the trial of the case (R. 31).

When the vessel returned to the United States on its scheduled run in April, 1956, (R. 30) this admiralty action was commenced in the United States District Court for the Southern District of Texas, Houston Division, against both the vessel and the shipowner (R. 2-7).

In order to avoid seizure of the vessel and its detention, the shipowner agreed to post a $100,000 bond in the District Court (R. 7, 30) and filed a Claim of Owner (R. 45), simultaneously with a general appearance on behalf of the shipowner (R. 44).

Upon filing the libel, the respondent herein sought to take the depositions of the officers and crew members of the SS. *Monrosa*. This procedure was strenuously opposed by the petitioners and their objections were sustained by the District Court (R. 32). Thus the carrier succeeded in delaying a prompt trial of the issues in this country—undoubtedly with the hope that it would be in a more advantageous position in its home forum.

It is doubtful that the Italian carrier has acted in good faith in this litigation. It now strongly urges that this action should be tried in Genoa, Italy, mainly because the officers of the *Monrosa* are residents of that country. However, their depositions could have been taken not only when

this action was commenced but also on a number of occasions when the SS. *Monrosa* returned to our ports subsequent to April, 1956 (R. 32).

In July, 1956 the petitioners requested the District Court to decline jurisdiction, (R. 8-28) relying on Clause 27 in their prepared, printed, unilateral bill of lading:

> "Clause 27—Also, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion was opposed on these grounds (R. 28-34):

1. Carbon Black Export, Inc. is an American citizen and accordingly should be entitled to sue in the courts of the United States and should not be forced to pursue litigation in the courts of Italy;

2. Clause 27 of the bill of lading did not prohibit an action *in rem* in the federal courts of the United States;

3. The carbon black was shipped from the ports of Houston and New Orleans and thus in those cities testimony is available as to the good order and condition of the cargo, the manner in which it was stowed on the SS. *Monrosa* and the seaworthiness of the vessel at the commencement of the voyage;

4. The *Monrosa* had made frequent calls at Gulf ports in the United States and thus the testimony of the crew members and officers could be taken here in the United States;

5. The shipowner still maintains an office through its general agent in Houston and in other Gulf ports

and its vessels make scheduled runs between Gulf ports of the United States and ports in Italy and other Mediterranean ports.

The District Court held for the petitioners and stated that Clause 27 was not unreasonable, citing *William H. Muller & Co.* v. *Swedish American Line, Ltd. et al.*, 224 F. 2d 806, cert. denied 350 U. S. 903, 76 S. Ct. 182 (R. 36-37).

An appeal was taken to the United States Court of Appeals for the Fifth Circuit, which reversed the District Court (R. 46-53). That court after careful deliberation on all the questions involved, held:

1. That agreements similar to that contained in Clause 27, made in advance of controversy whose object is to oust the jurisdiction of the courts, are contrary to public policy and will not be enforced; (R. 50)

2. That Clause 27 did not encompass suits *in rem* and thus had no applicability in this case as the action had been commenced not only against the shipowner but also the carrying vessel, the SS. *Monrosa* (R.49-50);

3. That the forum chosen by Carbon Black Export, Inc. was proper since (R. 51-52):

a. This action was brought by a citizen of the United States (to wit: Carbon Black Export, Inc.);

b. The cargo originated in the United States; thus all the testimony as to its condition is available in this country;

c. The contract of carriage was in part performed in the United States;

d. The bills of lading covering the carriage of the carbon black are printed in English;

e. The bills of lading incorporate the United States Carriage of Goods by Sea Act of 1936;

f. The testimony of the crew of the SS *Monrosa* could have been taken when the vessel was in the United States.

The decision of the Court of Appeals was correct in all respects.

Summary of Argument.

I. Agreements made in advance of controversy, the purpose of which is to oust United States courts of jurisdiction, have long been recognized as invalid as against the public policy of the United States.

The respondent, Carbon Black Export, Inc., an American citizen, engaged the petitioners, Navigazione Alta Italia and one of its vessels, the SS. *Monrosa,* to carry a quantity of carbon black. The cargo was loaded at Houston and New Orleans and at that time the petitioners executed twenty-seven of their prepared and printed bills of lading.

During the voyage the cargo was damaged and this action was commenced in the District Court, which it is conceded had jurisdiction.[1]

Clause 27 in the bill of lading provides in substance that no legal action thereunder may be brought against the captain, shipowners, or their agents in any court except those located in Genoa, Italy. This provision indisputably was incorporated by the carrier for its benefit and was intended to deprive American citizens and others from litigating their meritorious claims in courts in the United States.

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[1] Article III, Section 2 of the United States Constitution, 28 U. S. C. Sec. 1333.

As early as 1874, the Supreme Court of the United States ruled in *Insurance Company* v. *Morse*, 87 U. S. 445, that agreements and statutes which ousted United States courts of jurisdiction were invalid. This case has been consistently followed.

Twenty state jurisdictions which have considered similar agreements have reached the same conclusion as in *Insurance Company* v. *Morse*.

The majority of federal courts and especially those sitting in admiralty, have adhered to this principle, particularly where a common carrier unilaterally has inserted a provision in the bill of lading for its own advantage.

The petitioners argue that agreements providing for litigation of claims in foreign jurisdictions are valid when reasonable and cite as authority three cases decided in the Second Circuit, commonly referred to as the *Muller*[2], *The Geisha*[3] and *The Bio Bio*[4].

It is admitted that in each of those cases a jurisdictional clause was involved. However, the court did not rule on the validity of the jurisdictional clause itself but considered it together with all the facts and circumstances in each case. In other words, the court actually decided whether or not the forum chosen by the libelants was *more convenient* for the trial of the action.

As will be shown later, those cases can easily be distinguished from the case now before this court.

The fact that the Carriage of Goods by Sea Act[5] does not specify any forum for the trial of actions cannot be

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[2] *William H. Muller & Co.* v. *Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C. A.), cert. den. 350 U. S. 903 (1955).

[3] *The Geisha-Cerro De Pasco Copper Corp.* v. *Knut Knutsen, O. A. S.*, 187 F. 2d 990 (2 C. A., 1951).

[4] *Murillo, Ltd. et al.* v. *The Bio Bio, et al.*, 227 F. 2d 519 (2 C. A., 1955), aff. 127 F. Supp. 13 (S. D. N. Y., 1955).

[5] 46 U. S. C. Section 1300 and following.

interpreted that Congress intended to uphold the validity of jurisdictional clauses. Such clauses were not discussed when this act was drafted and passed. It is more logical to assume that there was no need for any consideration thereof since, prior to 1936, the overwhelming weight of authority in the United States was that they were invalid.

Petitioners would have Clause 27 enforced so as to encourage American shippers to engage American carriers to transport their goods to the exclusion of foreign flag vessels. This argument is without merit and a ruling to this effect would undoubtedly cause international ill will. Frequently American ships are not available to American shippers at the time they must deliver merchandise under their contracts, or American flag vessels are not scheduled to touch upon certain foreign ports and it is therefore necessary to engage foreign carriers.

If foreign carriers solicit American trade, they should be bound by American law.

II. An American citizen has the substantial right to select the forum in which he desires his action to be tried.

The petitioners, in asking this court to enforce Clause 27 are in effect depriving an American citizen of his right to litigate a cause of action in a United States court. They are further endeavoring for their own benefit to impose on an American citizen a condition, without consideration.

If foreign shipowners were given the absolute privilege to select any forum in which actions arising out of breach of contract of carriage were to be tried, it would result in a serious prejudice to American shippers and consignees. Claims involving a few hundred or a few thousand dollars would have to be abandoned for it would be economically unfeasible to sue in foreign countries.

Clauses such as No. 27 are for the carrier's benefit only, are prejudicial to American shippers and consignees. They in effect lessen the carrier's liability in violation of the provisions of the Carriage of Goods by Sea Act[6] and should be considered void.

III. Notwithstanding that Clause 27 in the bill of lading is invalid, *per se*, it is also unreasonable under the facts and circumstances in this case.

The petitioners rely on the *Muller*, *The Geisha* and *The Bio Bio* cases, *supra*, to support their position that Clause 27 is reasonable.

The courts in the Second Circuit considered the facts in each of those cases together with the jurisdictional clause and decided that for the convenience of the parties the cases should be tried in foreign countries. In all of those three cases the cargoes involved were loaded in foreign countries. The carrying vessels never touched the United States and no part of the contract of carriage was performed in the United States. Thus all of the testimony on the important issues in each case was available in foreign countries only.

In the instant case the facts are much different. Here the cargo was loaded at United States ports, the bills of lading were issued here and part of the contract of carriage was performed here. Only in the United States is there testimony as to the condition of the cargo, the seaworthiness of the vessel at the commencement of the voyage, the stowage of the cargoes, and the issuance of the bills of lading.

The petitioners plead that to prove seaworthiness of the vessel, it will be necessary to obtain the testimony of the officers and crew of the SS. *Monrosa*. The record is clear and uncontradicted that the depositions of these men could have been taken not only at the time this action was com-

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[6] 46 U. S. C. 1303(8).

menced but also when the SS. *Monrosa* returned to the United States on voyages subsequent to April, 1956.

Another point to consider is that the Italian courts would not enforce an agreement between an American citizen and an Italian resident which stipulated that all disputes thereunder must be litigated in the United States courts.

IV. Clause 27 does not apply to *in rem* actions.

Clause 27 must be strictly construed against the petitioners since they alone prepared and printed the bill of lading.

This clause states that no legal proceedings against the "Captain or Shipowners or their Agents" shall be brought in any court other than those located in Genoa, Italy. There is no mention of an *in rem* proceeding, a right which is recognized and enforced by our courts. The *in rem* proceeding is not just a device to obtain security but a ship in admiralty is liable, the same as any other legal person, and there are reciprocal obligations between ship and cargo. *The Maggie Hammond*, 76 U. S. 435.

The petitioners further contend that an *in rem* action cannot be divorced from an *in personam* action, citing three cases.[1] These cases have no application to this motion. They merely decided what rights a longshoreman had against his employer under the Longshoremen's and Harbor Workers' Compensation Act.

The petitioner's argument that Clause 27 includes an *in rem* action is a request to have the bill of lading rewritten for their own benefit. This the courts will not do.

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[1] *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3 C. A., 1952); *Bennett* v. SS. *Mormacteal, et al.*, 254 F. 2d 138 (2 C. A., 1958) and *Samuels* v. *Munson Steamship Line*, 63 F. 2d 861 (5 C. A., 1933).

ARGUMENT.

Agreements such as those set forth in Clause 27 of the bill of lading, made in advance of controversy and which seek to oust United States courts of jurisdiction, are void and repugnant to public policy.

If Clause 27 of the bills of lading is enforceable, its effect is to oust the duly constituted admiralty courts of the United States of jurisdiction.

Article III, Section 2 of the United States Constitution grants the Federal Courts jurisdiction over all cases of admiralty and maritime jurisdiction.

> "SECTION 2. Jurisdiction of Courts.
>
> SECTION 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; * * * "

Admiralty and maritime jurisdiction is granted to the District Court; 28 U. S. C. Sec. 1333:

> "SEC. 1333. Admiralty, maritime and prize cases.
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. * * *"

It is without question that the District Court did have jurisdiction of the case at bar, which jurisdiction is founded upon Constitutional grant. The issue before this Court then is clear:

"Does an Italian shipowner have the right or power to oust a proper District Court of its constitutional jurisdiction by inserting a clause, such as Clause 27, in its unilateral bill of lading prepared before any controversy has arisen?"

The weight of authority in the United States has unequivocally answered this question in the negative.

In the leading case of *Insurance Company* v. *Morse,* 87 U. S. 445, the State of Wisconsin provided by statute, that as a condition precedent to doing business in that State, a foreign corporation must agree not to remove any action to the federal courts. The insurance company did agree to this, but later violated the agreement by removing a cause to the federal court. The Supreme Court of Wisconsin upheld the agreement, but the United States Supreme Court reversed, saying at pages 450-452:

> "Is the agreement thus made by the Insurance Company one that, without reference to the statute, would bind the party making it?
>
> "Should a citizen of the State of New York enter into an agreement with the State of Wisconsin, that in no event would he resort to the courts of that State or to the Federal tribunals within it to protect his rights of property, it could not be successfully contended, that such an agreement would be valid.
>
> • • • • • •
>
> "We see no difference in principle between the cases supposed and the case before us. Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's* Case, be tried in any other manner than by a jury of twelve men, although he consent in open court

to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects, any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

"That the agreement of the Insurance Company, is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

"In *Scott* v. *Avery*, one of the cases, the Lord Chancellor says: 'There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago. * * *,* * *

"And the principle, Mr. Justice Story, in his commentaries on Equity Jurisprudence, sec. 670, says is applicable in courts of equity as well as in courts of law. * * * The regular administration of justice might be greatly impeded or interfered with by such stipulation, if they were specifically enforced."

In *The Kensington*, 183 U. S. 263, this Court held that restrictions on the liability of a steamship company for its own negligence or failure of duty toward a passenger, being against public policy, would not be upheld, though the ticket was issued and accepted in a foreign country and contained a condition making it subject to the law thereof, which sustains such stipulations. The court said at page 269:

"* * * As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Confl. L. Sections 38, 244.* * *"

The foregoing cases were followed in *Terral, as Secretary of State of the State of Arkansas,* v. *Burke Construction Co.,* 257 U. S. 529, 532:

"The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation

does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.* * *"

Our research has uncovered twenty state jurisdictions which have decided similar cases. All have followed the *Morse, Kensington* and *Terral* decisions, *supra:*

ARIZONA:

Otero v. *Banco De Sonora,* 26 Ariz. 356, 225 P. 1112;

ARKANSAS:

Standard Pipe Line Co. v. *Burnett,* 188 Ark. 491, 66 S. W. 2d 637, cert. den. 292 U. S. 649, 78 L. Ed. 1499, 54 S. Ct. 857;

CALIFORNIA:

General Acceptance Corporation of California v. *Robinson,* 207 Cal. 285, 277 P. 1039;

CONNECTICUT:

Parker, Peebles & Knox v. *El Saieh,* 107 Conn. 545, 141 A. 884;

IDAHO:

McCarty v. *Herrick,* 41 Idaho 529, 240 P. 192;

ILLINOIS:

Johnson v. *Royal Motor Car Insurance Association*, 226 Ill. App. 147;

IOWA:

Field v. *Eastern Building and Loan Association*, Iowa Supreme Court, 117 Iowa 185, 90 N. W. 717;

MAINE:

Bartlett v. *Union Mutual Fire Insurance Company*, 46 Me. 500;

MASSACHUSETTS:

Nashua River Paper Company v. *Hammermill Paper Company*, 223 Mass. 8, 111 N. E. 678;

MINNESOTA:

Detwiler v. *Lowden*, 198 Minn. 185, 269 N. W. 367, 269 N. W. 838;

MISSOURI:

Brucker v. *Georgia Casualty Company*, 326 Mo. 856, 32 S. W. 2d 1088;

NEW YORK:

Parker v. *Krauss Co.*, 157 Misc. 667, 284 N. Y. S. 478;

NORTH CAROLINA:

Gaither v. *Charlotte Motor Car Company*, 182 N. C. 498, 109 S. E. 362;

OREGON:

Kahn v. *Tagwell*, 125 Or. 528, 266 P. 238;

PENNSYLVANIA:

Healy v. *Eastern Building and Loan Association*, 17 Pa. Super. 385;

RHODE ISLAND:

Pepin v. *Societe St. Jean Baptiste*, 23 R. I. 81, 49 A. 387, 91 Am. St. Rep. 620;

TENNESSEE:

Dafoe v. *Starek*, 9 Tenn. App. 668;

TEXAS:

Bexar County Mutual Insurance Company v. *Ward et cix*, Tex. Cir. App. 245 S. W. 2d 325;

WASHINGTON:

Washington Local Lodge No. 104 et al. v. *International Brotherhood, etc.*, 183 P. 2d 504, 28 Wash. 2d 536;

WEST VIRGINIA:

Savage v. *Peoples' Building Loan & Savings Association*, 45 W. Va. 275, 31 S. E. 991.

The lower federal courts, both on the civil side and sitting in admiralty, have generally adhered to the above principle of law:

United States v. *Leahy*, (3 Cir.), 148 F. 2d 462, 467;

United Fuel Gas Co. v. *Columbian Fuel Corporation*, (4 Cir.), 165 F. 2d 746;

Burt v. *Isthmus*, (5 Cir.), 218 F. 2d 353, cert. denied 349 U. S. 922;

Columbia Casualty Company v. *T. E. Mahaney*, (5 Cir.), 229 F. 2d 848;

Akerly v. *New York Central R. Co.*, (6 Cir), 168 F. 2d 812.

The Ciano, 58 F. Supp. 65, 66;[8]
The Neck, 138 Fed. 144;[9]
The Falls of Keltie, 114 Fed. 357, 358;[10]
Jefferson Ins. Co. v. *Cia Colonial de Navegacao*, 121 F. Supp. 828;
Gough et al. v. *Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 Fed. 174;

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[8] In that case six libelants sued in admiralty and the Steamship "Ciano" was attached under a writ of attachment. The proctors for the vessel and her owners filed exceptions to the libel on the ground that Clause 18 in the bill of lading provided that shippers and receivers submitted themselves to the jurisdiction of the judges and tribunals where the shipowners were located. The court dismissed the exceptions in this language found at pages 66-67:

> "In analyzing carefully the authorities, I am persuaded to the views set forth in *The Edam* case, *supra*, as it seems to me that these provisions are not in a true sense, clauses providing for arbitration, but rather clauses and agreements which attempt to give preference to one court over another, and to attempt to construe them as real agreements for arbitration within the purview of the Arbitration Act would be to confer exclusively jurisdiction as here on a foreign tribunal and thus oust the jurisdiction of the United States Court.
>
> "The exceptions are dismissed."

[9] "* * * Exclusive jurisdiction of all admiralty and maritime causes cognizable within the United States is by the Constitution vested in the National courts, and a citizen of the United States who is a party to a suit of admiralty and maritime jurisdiction cannot be deprived of the right to have such a suit adjudicated by a court upon which admiralty jurisdiction has been conferred pursuant to the Constitution. The Falls of Keltie (D. C.), 114 Fed. 357; 25 Am. & Eng. Encyc. Law (2d ed.), page 118."

[10] "* * * I do not think that the courts of any nation will refuse to hear the complaints and enforce the rights of its own citizens or subjects against foreign ships. Certainly this court has no right to refuse its process when demanded by any citizen of the United States. By the constitution of the United States, the people have ordained that judicial power shall be vested in the supreme court, and in inferior courts to be established by law, and that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. The manifest purpose of these provisions is to insure to citizens of the United States means for the redress of wrongs and the enforcement of legal rights."

Latimer v. *S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469, 472;
The Edam, 27 F. Supp. 8;
The Joh Gorthon, 1949 A. M. C. 1198 (not officially reported).

The leading text authorities are in agreement with the decisions in the above cited cases.[11]

The petitioners contend that Clause 27 is valid and cite as authority: *William H. Muller & Co.* v. *Swedish American Line, Ltd., et al.*[12], *The Geisha-Cerro De Pasco Copper Corp.* v. *Knut Knutsen, O.A.S.*[13], and *Murillo, Ltd., et al.* v. *The Bio Bio et al.*[14] It will be demonstrated *infra* that in those cases the contracts were made and performed *outside the limits* of the United States and the shipments had no contact with any port of the United States. In the present case an American citizen is a party to the contract, the shipments originated in the United States and the contract was performed in the United States.

It is evident from a reading of these cases that the courts in the Second Circuit considered the jurisdictional clauses together with the convenience of the forum where the actions were brought and decided that it would be more convenient to try the actions abroad.

The petitioners advance two other points which we believe have little or no merit. However, since they have been made, they should be answered.

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[11] 17 Corpus Juris Secundum §229, page 603.
Williston on Contracts, Revised Edition, Volume VI §1725.
14 Am. Jurisprudence Courts, §196, pp. 389-390.
In *Knauth* "Ocean Bills of Lading—1953", page 238.

[12] 224 F. 2d 806 (2 C. A.), cert. denied 350 U. S. 903 (1955).

[13] 187 F. 2d 990 (2 C. A., 1951).

[14] 227 F. 2d 519 (2 C. A., 1955), aff'd. 127 F. Supp. 13 (S. D. N. Y. 1955).

The petitioners argue that since Congress did not define in the Carriage of Goods by Sea Act (46 U. S. C. 1300 *et seq.*) the forum or forums in which parties could bring an action, clauses providing for litigation abroad are valid. In the Congressional hearings held when the enactment of this Act was considered, jurisdictional clauses were not discussed. However, there was a specific provision inserted in the Carriage of Goods by Sea Act, prohibiting the carrier from exempting itself or limiting its liability.[15]

We fail to see the legitimacy of the petitioners' contention that Congress intended that a jurisdictional clause would be held valid when there was absolutely no discussion on the point.

Is it not more logical to assume that there was no necessity for including any provision in the act specifying the forums which are available to litigants when the overwhelming weight of authority was, prior to 1936, that jurisdictional clauses were *per se* invalid?

The other argument made by the petitioners is that an American shipper, having selected a foreign carrier to transport his goods, should be bound by a clause inserted in the bill of lading for the foreign carrier's benefit only. This argument has absolutely no substance. If the American shipper were compelled to ship his goods on American ships, it would have a serious effect on international trade and would result in ill-feeling among nations. Certainly foreign nations would not be very appreciative if American carriers inserted in their bills of lading that all litigation could only be resorted to in the courts of our country.

If foreign carriers solicit American trade, they should be bound by the rulings of our courts and our public policy where an American citizen is involved and brings a just cause of action.

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[15] 46 U. S. C. 1303(8).

Thus, based on overwhelming precedent, the United States Court of Appeals for the Fifth Circuit made a proper determination in the present case in holding[16] (R. 50):

> "We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of *forum non conveniens*. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."

Clause 27 of the bill of lading denies an American citizen his substantial right to select the forum where his action is to be tried and lessens the Carrier's liability in violation of the Carriage of Goods by Sea Act.

The respondent herein has a substantial right to select the forum in which to litigate its meritorious claim.

This right was upheld by this court in *Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 265:

> "• • • We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5 of the Liability Act: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . .' The contract before us is therefore void."

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[16] 254 F. 2d 297, 300 (R. 46-52).

In that case the petitioner was an employee of a railroad. While acting in the scope of his employment he was injured. Thereafter the railroad made certain payments to him for necessities in return for a signed receipt which contained a clause providing that in the event his case could not be settled, he would sue in the place where he resided or where the injuries occurred, which was either in the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan. The petitioner sued in the Superior Court of Cook County, Illinois. The railroad company thereupon moved to dismiss, relying on the aforementioned agreement. This court ruled that the agreement was invalid as it was an attempt by the carrier to exempt itself of liability.

Although the Federal Employers' Liability Act was considered in that case, we believe the court recognized that an American citizen may, subject to jurisdictional requirements, sue in the forum of his choice.

Clause 32 of the bill of lading (R. 25) in the instant case incorporates the Carriage of Goods by Sea Act, 46 U. S. C. Section 1300 *et seq.* Section 1303(8)[17] thereof provides that any clause whereby the carrier seeks to lessen its liability is null and void.

Following the reasoning in the *Boyd* case, and by reading Clause 27 together with Section 1303(8) of the Carriage of Goods by Sea Act, we reach the inevitable conclusion that the petitioners are attempting to lessen their liability and thus the jurisdictional clause is void.

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[17] "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, *or lessening such liability otherwise than as provided in this chapter*, shall be null and void, and of no effect * * *" (Emphasis supplied).

The ruling of the *Boyd* case was adhered to in *Wilko* v. *Swan*, 346 U. S. 427, 437-438, 74 S. Ct. 182:

> "This accords with Boyd *v.* Grand Trunk Western R. Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55. We there held invalid a stipulation restricting an employee's choice of venue in an action under the Federal Employers' Liability Act, 45 U. S. C. A. §51 *et seq.* Section 6 of that Act permitted suit in any one of several localities and §5 forbade a common carrier's exempting itself from any liability under the Act. Section 5 had been adopted to avoid contracts waiving employers' liability. It is to be noted that in words it forbade exemption only from 'liability.' We said the right to select the 'forum' even after the creation of a liability is a 'substantial right' and that the agreement, restricting that choice, would thwart the express purpose of the statute. We need not and do not go so far in this present case. By the terms of the agreement to arbitrate, the petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of controversy stands upon a different footing."

The aforementioned cases are followed by lower courts sitting in admiralty.[18]

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[18] *Kinsman Transit Co.* v. *Dunham Towing & Wrecking Co.*, 122 F. Supp. 911, 912":

> "• • • The libelant's choice of forum is a substantial right and should not be disturbed unless the balance of convenience lies strongly in favor of the respondent. Boyd *v.* Grand Trunk Western R. Co., 1949, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55; Nicol *v.* Koscinski, U. S. Dist. Judge, 6 Cir., 1951, 188 F. 2d 537. The facts inherent in this case clearly demonstrate that the balance of convenience does not lie strongly in the respondent's favor. It may not be said, that 'for the convenience of the parties and the witnesses and in the interest of justice', the case should be transferred."

In *Wilko* v. *Swan, supra,* this court not only ruled that a litigant had a substantial right to select the forum in which to try his case but it also recognized that agreements made in advance of controversy stand on a different footing than those made after a controversy has arisen and in all probability the former are invalid.

If such jurisdictional clauses as set forth in Clause 27 of the bills of lading are upheld, what would be the effect? It could only mean that any shipowner, American or foreign, could provide that any dispute under the bill of lading be brought only in the state where the American shipowner is incorporated or in the city where the foreign shipowner is incorporated. Such possibilities seem remote but they are not absurdities. Following one step after the other, the ultimate could be attained and our American shippers or consignees would be so limited and restricted, or forego all right of redress for loss or damage to cargo.

By this attempted substitution of the place of trial in Italy for a citizen's constitutional right to the use of our courts, a lessening of the carrier's liability is accomplished. It is a restriction upon cargo which lessens a carrier's liability to respond in full for wrongful damage. Assume a just and meritorious claim involves only such sum as $1,000. Is it economically feasible to litigate the matter in Italy and transport to such country surveyors, persons having knowledge of market value, and fact witnesses or to take the depositions of such witnesses for use in the Italian courts? If not, then abandonment of the claim results and the carrier has in fact accomplished a lessening or avoidance of a liability otherwise imposed upon him by law and it has done this merely by resorting to a unilateral provision inserted in a bill of lading.

To allow such a clause to stand as valid would soon spell the doom of our Carriage of Goods by Sea Act. As

interpreted and enforced by the courts of Italy and other foreign lands, it would result in decisions never contemplated by the framers of the Act.

The bills of lading containing such clauses are in effect unilateral contracts and very unfair and prejudicial to the shipper or consignee, who has no choice but to accept them. Clauses having similar intendment have been held invalid.[19]

Based on the facts in this case, Clause 27 in the bill of lading is unreasonable.

Several factors must be considered in determining whether a jurisdictional clause is reasonable or unreasonable: (1) where the contract was made, (2) how the agreement was negotiated and executed, (3) the forum in which

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[19] The Court of Appeals for the Second Circuit, in speaking of the so-called "Both to Blame" clause in a bill of lading as it relates to cargo damaged by collision between vessels, said in *United States* v. *Farr Sugar Corp. et al.*, 191 F. 2d 370, aff'd 343 U. S. 236, at page 374:

> "One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this Clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441, 9 S. Ct. 469, 32 L. Ed. 788; *Inman* v. *South Carolina R. Co.*, 129 U. S. 138, 139, 9 S. Ct. 249, 32 L. Ed. 612; *Santa Fe, P. & P. R. Co.* v. *Grant Bros. Const. Co.*, 228 U. S. 177, 184, 185, 33 S. Ct. 474, 57 L. Ed. 787. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. * * *"

the action is to be tried and, (4) the availability of witnesses.[20]

In the present case the bill of lading was prepared in the United States by an Italian shipowner and no opportunity was given to the shippers to negotiate any of its terms. These facts alone are sufficient to demonstrate the unreasonableness of Clause 27.

There are other facts which support respondent's position. By design and primarily for its own convenience, advantage and interest, the carrier seeks to litigate this claim in Genoa, Italy, where it has its main office and place of business. Thus the shipper is not only restricted to a foreign country in which to prosecute its claim but to a single city, the carrier's home port. This further points up the unreasonableness of the clause.

The petitioners argue that the case should be tried in Genoa because:

1. The vessel is owned by a Genoese corporation;

2. The vessel's crew are Italian and reside in Italy;

3. Some of the cargo was to be discharged at Genoa, Italy;

4. Proof of market value is in Genoa, Italy;

5. Proof as to the seaworthiness of the vessel is available in Italy;

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[20] *Murillo Ltda.* v. *The Bio Bio, The Paraguay, The Argentina*, 127 F. Supp. 13, 14-15:

> "Similar doubt attends availability of *forum non conveniens* in admiralty suits generally and especially ones where a United States citizen is a libelant. In any event, the factors determinative of an inconvenient forum largely turn upon identical ones involved in the unreasonableness of a stipulation limiting the tribunal to which resort may be had, and accordingly both the ground of unreasonable stipulation and that of inconvenient forum should be appraised together."

6. A general average has been declared in Italy;

7. The American shipper could have chosen an American ship on which to ship its cargo.

None of these reasons is persuasive.

That the SS. *Monrosa* is owned by a Genoese corporation cannot have any bearing on the merits of respondent's claim. Like countless other foreign vessels, it was engaged in trade between United States ports and foreign ports and thereby came within the jurisdiction of our Courts.

The petitioners had many opportunities to take the testimony of the officers and of the crew members of the *Monrosa* at the time when and subsequent to when this action was commenced. In fact, the respondent's attempts in this regard were thwarted by the vigorous efforts of the petitioners. Certainly these tactics demonstrate the unreasonable attitude of the petitioners.

That the cargo was discharged at Genoa, the forum selected by the petitioners, is not a strong argument. It will certainly be conceded that the cargo was seriously damaged. It will be respondent's burden to establish its monetary loss, which it is willing to assume in a trial in this country.

The voyage in question commenced at Houston and New Orleans and thus it must be established that on leaving those ports that the vessel was seaworthy.[21] The witnesses to be called by the petitioners on this point are its agents, stevedores and loading surveyors, all of whom are United States citizens residing in this country. It would be burdensome on both parties to litigate a case in Italy and have

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[21] 46 U. S. C. §1303—

"RESPONSIBILITIES AND LIABILITIES OF THE CARRIER AND SHIP—SEAWORTHINESS. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy. * * *"

to return to the United States to obtain the testimony of so many witnesses.

The fact that a general average has been declared is not involved in this litigation. If the respondent herein is correct in its contention that the vessel was unseaworthy when it broke ground at Houston and New Orleans, then, of course, there can be no general average.

The carrier's last argument demands little comment. We do not think that this court would hold that in this day of international trade that an American citizen should be forced to ship his goods on American ships. The demands of modern business are such that often times the schedules of American lines cannot meet delivery dates called for in shipper's contracts and thus it is necessary to engage other carriers. To hold that American shippers should engage American ships only would result in international ill-will.

As against the foregoing seven reasons of the petitioners, there are these circumstances, which make it more reasonable to try the action here:

(1) The SS. *Monrosa* loaded the cargoes at Houston and New Orleans;

(2) All of the testimony concerning the seaworthiness of the vessel at the commencement of the subject voyage should be available in Houston and New Orleans;[22]

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[22] *Union Carbide & Carbon Corp.* v. *United States*, 200 F. 2d 908, 910:

"The parties differ on the time which should be considered the commencement of the voyage, when the vessel should have been placed in seaworthy condition. The precedents and reason leave no doubt that as to a particular cargo it should be when that cargo is lifted, or here at Takoradi on March 31, 1945, The Southwark, 191 U. S. 1, 13, 24 S. Ct. 1, 48 L. Ed. 65; May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U. S. 333, 342, 54 S. Ct. 162, 78 L. Ed. 348; The President Polk, 2 Cir., 43 F. 2d 695, 696, 697; The J. L. Luckenbach, D. C. S. D. N. Y., 1 F. Supp. 692, 707, affirmed 2 Cir., 65 F. 2d 570."

(3) All of the log books and other ship's papers can be readily made available to the trial court;

(4) Testimony of the ship's officers and crew could have been taken in the United States when the SS. *Monrosa* returned here on any one of her visits to U. S. A. east coast and Gulf ports.

(5) The stowage of respondent's cargoes can only be established by witnesses in Houston and New Orleans;

(6) The bills of lading covering the shipment of respondent's cargoes were issued in New Orleans and Houston;

(7) The proof as to the good order and condition of the cargoes at the time of shipment is obtainable only in the United States;

(8) The bills of lading are printed in the English language and incorporate the United States Carriage of Goods by Sea Act.

Another reason which makes Clause 27 unreasonable under the circumstances is that the Italian courts would not enforce an agreement between an Italian citizen and an American citizen which stipulated that all actions thereunder must be brought in the courts of the United States (unless the Italian citizen neither resided nor was domiciled in Italy). This is specifically set forth in Article 2 of the Italian Code of Civil Procedure, the English translation of which is as follows:

> "The Italian Jurisdiction cannot be derogated by an agreement in favour of a Foreign Jurisdiction or of arbitrators issuing their awards abroad unless the Action refers to obligations as between foreigners or between a foreigner and an Italian National neither residing nor domiciled in the Italian Republic and unless the derogation is substantiated by a written deed."

This court in *Hilton* v. *Guyot*, 159 U. S. 113, would not enforce a judgment rendered in a French court because a judgment rendered in our courts would not be given full recognition in the French courts. This court discussed the rule of reciprocity at pages 227-228:

> "The prediction of Mr. Justice Story (in §618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.
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> "The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.
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> "In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive."

The petitioners rely on the *Muller*,[23] the *Geisha*[24] and the *Bio Bio*[25] cases to support their position that Clause 27 is

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[23] 224 F. 2d 806 (2 C. A.), cert. denied 350 U. S., 903 (1955).

[24] 187 F. 2d 990 (2 C. A.).

[25] 227 F. 2d 519, aff. 127 F. Supp. 13.

reasonable. All those cases are clearly distinguishable from the instant case. In the *Muller* case, the cargoes were loaded at Gothenburg on the SS. *Oklahoma,* a Swedish flag vessel owned by a Swedish corporation, to be discharged at Philadelphia. The *Oklahoma* never arrived in the United States, as it was lost at sea.

In the *Geisha* case the cargoes were loaded on board that vessel in Peru and were to be discharged at certain European ports. The vessel did not touch any port of the United States nor was any part of the contract of carriage performed in the United States.

In the *Bio Bio* case, the cargoes were loaded on three Swedish flag vessels at Antwerp, Belgium, and were to be discharged at Arica, Chile. As in the *Geisha* case, the vessels did not touch any port of the United States nor was any portion of the contract of carriage performed in the United States.

The Court of Appeals for the Second Circuit in the *Muller* case, *supra,* recognized that parties cannot oust a United States Court of jurisdiction by agreement and unambiguously held that each case must be judged on its own facts.[26] In other words that court was considering the jurisdictional clause together with the *forum non conveniens* theory.

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[26] 224 F. 2d 806, 808 "* * * From this it follows that in each case the enforceability of such an agreement depends upon its reasonableness. We agree with the appellant to this extent: the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented. Such, essentially, was our holding in Cerro De Pasco Copper Corp. *v.* Knut Knutsen in the case of The Geisha, 2 Cir., 187 F. 2d 990. We adhere to that ruling."

The same principle was declared in the *Geisha*[27] and *Bio Bio*[28] cases.

It is important to note that in all three cases the testimony and documents pertaining to the main issues, i.e., stowage of cargo, seaworthiness of the vessel, condition of the cargo, issuance of bills of lading, and all other important matters could be obtained only outside the United States.

Notwithstanding the three decisions referred to, the courts in the Second Circuit are reluctant to enforce jurisdictional clauses.[29]

In the instant case all of the testimony as to stowage of cargoes, issuance of bills of lading, seaworthiness of the vessel, condition of the cargoes, is available right here in the United States.

In *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, this court discussed the theory of *forum non conveniens* and set forth certain criteria at pages 508 and 509:

> "* * * Important considerations are the relative ease of access to sources of proof; availability of

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[27] 187 F. 2d 990, 991 "* * * The court's conclusion that it was not the appropriate forum clearly did not constitute an abuse of discretion, considering these facts stated by the district judge: 'No loading of this vessel took place in any United States port. All of the cargo was to be delivered in European ports * * *. None of the crew of the Geisha are in the United States and none are planning to visit the United States'."

[28] 127 Fed. Supp. 13, 16 "In the light of all of the connecting factors, the reasonableness of the limitation of tribunal to the carrier's domicile is apparent. There is no reason why this court ought not to give it consideration. Weighing thus this stipulation in the balance of conveniences, respondents have sustained the burden of making out the inconvenience of this forum."

[29] Chemical Carriers Inc. v. L. Smit & Co's Internationale Sleepdienst 154 F. Supp. 886, 888: "It is no longer the law that contractual provisions which purport to limit a jurisdiction which would otherwise attach are void and unenforceable. (Cases cited) Nevertheless, such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute. (Cases cited)"

compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

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"* * * There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

Applying the rules of the *Gilbert* case, the trial of this action should be conducted in the District Court in Texas. As shown, most of the testimony pertaining to the issues must be obtained in Houston and New Orleans. In addition, the United States Carriage of Goods by Sea Act, which is incorporated in the bill of lading (Clause 32 of the bill of lading R. 25), is the prevailing law and as stated in the *Gilbert* case, it should be decided by United States courts and not by Italian courts.

The reasoning of the *Gilbert* case was affirmed in *Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U. S. 518, at pages 524 and 525.[30]

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[30] "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed

The District Courts sitting in admiralty will rarely decline to take jurisdiction of an action which is commenced by an American citizen.[31]

It can be readily realized why the United States Court of Appeals for the Fifth Circuit, after considering all of the facts, held that this action must be tried in this country (R. 51-52).

The cause of action *in rem* must be heard and determined by the District Court.

It is admitted that this action is *in rem* and *in personam* (pages 2 and 3 of petitioners' brief).

Before any consideration should be given to the petitioners' request that Clause 27 be enforced and the American shipper be relegated to Italian courts, it must be first determined if the provisions thereof apply to *in rem* actions. This clause must be strictly construed in accordance with the law of contracts.

Clause 27 says in substance that no legal proceedings against the "Captain or Shipowners or their Agents" shall be brought in any court except those located in Genoa,

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advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or non-existent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

* * * * * *

"While, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of 'high significance.' *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, 520. * * *"

[31] The Suadades, 67 F. Supp. 820.

Italy. It does not speak of any prohibition to an action against the vessel itself—a remedy recognized by all maritime nations. This glaring omission can only mean that such actions are maintainable in all jurisdictions.

Our courts have always recognized an *in rem* cause of action by a cargo owner. This procedure is not just a device to obtain security as the petitioners herein contend. In admiralty the vessel is held responsible for damage just as any other legal person. To argue otherwise is either an attempt to mislead this court or is a misunderstanding on the part of the petitioners as to the remedies available to aggrieved cargo owners. The admiralty rules point up the separability of *in personam* and *in rem* actions and provide for service of process in each;[32] our law reports are replete with decisions on this point.

An action *in rem* is peculiarly useful in the admiralty. The ship which does the damage may sail away and may not return for years, if ever. Actions against the foreign vessel owner *in personam* may prove an idle gesture even though the owner may ultimately be found. In such instances a direct action against the offending vessel herself offers the only effective remedy to the owner of the cargo.

The *Maggie Hammond*, 76 U. S. 435, (decided in 1869) discussed the reciprocal obligations of cargo and vessel at pages 449-450:

> "Undoubtedly the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the shipowner has upon the cargo for the freight, as expressed in the maxim, *Le batel est obligé*

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[32] "28 U. S. C.—Admiralty Rules
"Rule 2.
"Rule 10."

à la marchandise et la marchandise au batel. Subject to the exception that the lien of the shipowner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter-party or bill of lading, the rule is universal as understood in the decisions of the Federal courts, that the ship is bound to the merchandise and the merchandise to the ship for the performance on the part of the shipper and shipowner of their respective contracts.

"Shipowners contract for the safe custody, due transport, and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfilment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement."

The above principle is ingrained in maritime law and is found in recent cases such as *Motor Distributors Ltd. et al.* v. *Olaf Pedersen's Rederi A/S*, 239 F. 2d 463,[33] cert. denied 353 U. S. 938, rehearing denied 353 U. S. 989 and *Pioneer Import Corporation* v. *The Lafcomo et al.*, 138 F. 2d 907, 908,[34] cert. denied 321 U. S. 766.

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[33] At page 467 the court said:

"Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers, it seems that one of the most universally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against a vessel, to proceed *in rem* in the jurisdiction where the vessel is found."

[34] "* * * The ship was thus unseaworthy in respect to its carriage (cases cited). Both respondent and the vessel are therefore liable; the maritime lien against the ship for safe carriage obtains whether or not it was under charter. *The Maggie Hammond*, 9 Wall. 435,

There is nothing unique in joining a cause of action *in rem* with one *in personam* for cargo damage. No objection is found either in the admiralty rules[35] or case law. In fact, this consolidation is encouraged.

In *Newell* v. *Norton and Ship*, 70 U. S. 257, this court by Mr. Justice Grier held at page 266:

> "The libel in this suit was originally against the steamboat Hill, and against the master, who was part owner, and, also, against the pilot. It was amended in the District Court by dismissing it as to the pilot, and sustained as against the vessel and the master, or owner. The allowance of this amendment was within the discretion of the court, and was very proper. The objection that a libel *in rem* against a vessel, and *in personam* against the owner, cannot be joined, was properly overruled; as it was in conformity with the 15th rule in admiralty as established by this court."

This court's ruling was followed in subsequent cases such as *Turner* v. *United States*, 27 F. 2d 134, 135-136[36]

449, 450, 76 U. S. 435, 19 L. Ed. 772; Taylor Bros. Lumber Co. *v.* Sunset Lighterage Co., 2 Cir., 43 F. 2d 700, 701; *The Esrom*, 2 Cir., 272 F. 266, 271, certiorari denied 257 U. S. 634, 42 S. Ct. 47, 66 L. Ed. 408."

[35] 28 U. S. C. Admiralty Rules.

[36] "In Homer Ramsdell Transp. Co. *v.* La Compagnie Generale Transatlantique, 182 U. S. 406, 411, 21 S. Ct. 831, 833, 45 L. Ed. 1155, the court said: 'At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot.' The pending of a libel *in rem* is not a bar to a suit *in personam* arising out of the same facts. Proceedings *in rem* and proceedings *in personam* are permitted to be joined in one cause of action, where the admiralty rules do not prohibit it. If the right against the ship and that against the owner are mutually coextensive, it would be difficult to justify cases permitting the two actions. Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271; Planet Venus (D. C.) 113 F. 387; La Normandie (C. C. A.) 58 F. 427; Providence, etc. Ins. Co. *v.* Wager (D. C.) 35 F. 364. * * *"

and *Pioneer Import Corporation* v. *The Lafcomo et al.*, (*supra*).

The petitioners, in arguing that Clause 27 includes *in rem* actions, attempt to broaden the language of the clause to include a non-existing provision and are really requesting that the bill of lading be rewritten for their own benefit. This the courts will not do.[37]

A reading of the entire bill of lading proves that the carrier was fully cognizant of the difference and distinction between the terms "shipowner," "ship," and "captain."

The bill of lading itself restricts the word "steamship" in this language (R. 13):

> "The word 'steamship' or 'steamer' as used in this form of bill of lading is understood to include and to stand for a 'motor ship' as the case may require."

Clause 35 of the bill of lading (R. 27)[38] clearly demonstrates that the petitioners understood that actions *in rem* and *in personam* are not synonymous and that an *in rem* action cannot be effected until process issues against the "ship" even though jurisdiction had been obtained over the "carrier" (shipowner).

Other clauses in the bill of lading which distinguish "ship" and "shipowner" are found in the first paragraph

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[37] It was held in *Shell Oil Co.* v. *Manley Oil Corporation*, 124 F. 2d 714, 715, cert. denied 316 U. S. 690:

"• • • Courts are not authorized to make contracts for the parties, but must construe them as written, and where plain, common words are used in their ordinary meaning, they must be accepted in that sense. • • •"

[38] "35.—In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the carrier and/or the ship by service of process or by an agreement to appear."

of page 16 of the record and clauses 15, 17, 23, 24, 25 (R. 22, 24) as well as Clause 27.

The Carriage of Goods by Sea Act, which is incorporated in the bill of lading by Clause 32[39] (R. 25), makes a distinction between "carrier" ("shipowner") and "ship," 46 U. S. C. Section 1301:

> "(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> • • • • • •
>
> "(d) The term 'ship' means any vessel used for the carriage of goods by sea."

The terms and conditions of the bill of lading must be strictly construed against the petitioners since they alone prepared and printed the document. This is a basic principle of law[40] and is rigidly applied when, as in this case, a common carrier inserts a clause in a bill of lading for its own advantage.

In *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104, Mr. Justice Gray at page 118 discussed this point:

> "Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him. *The Caledonia*, 157 U. S. 124, 137; *The Majestic*,

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[39] "32.—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

[40] *Noonan* v. *Bradley*, 76 U. S. 394, 407; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 282; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421, 424-425; 17 *Corpus Juris Secundum*, pp. 751-753 (Section 324).

166 U. S. 375, 386; *Norman* v. *Binnington*, 25 Q. B. D. 475, 477; *Baerselman* v. *Bailey* (1895) 2 Q. B. 301, 305."

The Court of Appeals for the Ninth Circuit in *Pope & Talbot, Inc.* v. *Guernsey-Westbrook Co.*, 159 F. 2d 139, 141, recognized the disadvantage in which a shipper is placed in accepting the carrier's printed bill of lading:

> "It is true that other constructions more favorable to the carrier may be conceived, but it is the seller-carrier's printed document, in whose framing the buyer had no part, which is under construction. The usual rule applies that if ambiguous inferences of its terms are rationally conceivable, that one controls which is favorable to the buyer-shipper (Citing cases)."

The United States Court of Appeals for the Second Circuit made similar rulings in *Lines* v. *Atlantic Transport Co.*, 223 Fed. 624, 625[41] and *U. S.* v. *Farr Sugar Corp.*, 191 F. 2d 370, 374, affirmed 343 U. S. 236.[42]

The petitioners say that in the *Muller*, *The Geisha* and *The Bio Bio* cases, no mention was made of *in rem* actions in the jurisdictional clauses and that the courts did not find it necessary to distinguish between *in personam* or *in rem* actions.

In none of those cases was jurisdiction ever obtained over the vessel and thus this vital point was not considered. In the *Muller* case, the vessel carrying the cargo was lost at sea as was found by the United States Court of Appeals

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[41] "Being ambiguous, and its object being to relieve a carrier from its legal obligation, we think it should be construed against the carrier. If he has not made his exception clearly and unmistakably in the form our courts recognize as valid, he has not made one he can enforce here."

[42] See footnote (19)

for the Fifth Circuit (R. 49). In *The Geisha* case, the vessel was not named as a respondent and the action was *in personam* only.

Contrary to the petitioner's erroneous impression there was no *in rem* action in *The Bio Bio* case. The court records have been searched in this case and no Claim of Owner or bond is on file. In addition, there was no letter of guarantee or any other agreement signed by any of the parties that the vessel would appear in the action. The mere mentioning of a vessel as a respondent does not perfect an *in rem* cause of action. Jurisdiction must be obtained over the vessel by service of process or there must be an agreement to appear on behalf of the vessel, as provided for in the Admiralty Rules.[43] These very requirements are set forth in Clause 35 of the bill of lading (R. 27).

The petitioners contend that the District Court which decided *The Bio Bio*[44] case recognized that there were *in rem* and *in personam* causes of action. They quote as follows from Judge Murphy's decision at page 14:

> "Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons * * * or the subject matter of this controversy.* * *" (Page 27 of petitioners' brief).

Conveniently and evidently intentionally, the petitioners omitted a very important part of this sentence which reads: "(process was served at their office where business is being done within this judicial district)". These words appear in the decision after the word "persons." Thus the entire sentence reads:

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[43] 28 U. S. C. Admiralty Rules, Rule 10.

[44] 127 F. Supp. 13.

"Respondents do not question, upon appearance and oral argument or in brief, the jurisdiction of this court either over their persons (process was served at their office where business is being done within this judicial district) or the subject matter of this controversy. * * *"

It is evident that Judge Murphy was speaking about *in personam* actions only. There is not one mention in that case or for that matter in the *Muller* or *The Geisha* cases of an *in rem* cause of action.

We would also like to correct a further misinterpretation by the petitioners of *The Bio Bio* case. The Court of Appeals did not interpret the clause but merely affirmed, in a one sentence opinion, the lower court's decision.[45] It never discussed either an *in rem* or an *in personam* cause of action. It is obvious that the petitioners are attempting to bolster their weak argument by basing unfounded and unsupportable inferences upon inferences.

In our research we have been unable to uncover any reported case wherein any court enforced a clause similar to Clause 27 where (1) cargo had been shipped from the United States; (2) an action had been commenced by an American citizen and (3) jurisdiction had been obtained over a vessel and an *in rem* action had been perfected.

It is claimed by the petitioners that *in rem* and *in personam* actions are the same proceeding and cannot be divorced, citing *Smith* v. *The Mormacdale,* 198 F. 2d 849; *Bennett* v. *SS. Mormacteal,* 254 F. 2d 138 (Affirmed 160 F. 840), cert. denied 79 S. C. 26 (October 13, 1958) and *Samuels* v. *Munson Steamship Line,* 63 F. 2d 861. These cases are not in point and have no application here. In each

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[45] 227 F. 2d 519 "127 F. Supp. 13, affirmed in open court on the authority of W. H. Muller & Co. *v.* Swedish American Line, Ltd., 2 Cir., 224 F. 2d 806."

one of those cases the libelant was a longshoreman who brought an action *in rem* to recover for personal injuries. In each of those cases the libelant-employer was also the vessel owner. The rights of a longshoreman are governed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code §901 and following. Section 905 in substance provides that the remedies set forth in section 904 are exclusive to the longshoremen and the other persons stated therein. The courts in all three cases held that longshoremen could not proceed against their employers in any way other than specified in Section 904.

The ruling in those cases was clearly explained in *Central Railroad Company of New Jersey* v. *Burns Bros.*, 202 F. 2d 910, at page 913:

> "• • • *Smith* vs. *The Mormacdale*, 198 F. (2d) 849 (3CA) and *Samuels* vs. *Munson SS. Co.*, 63 F. 2d 861 (5CA), on which the Central Railroad relies, are irrelevant; they decided no more than that in the Longshoremen's and Harbor Workers' Compensation Act, Congress meant to make exclusive the liabilities that it imposed. • • •"

In other words, those courts did no more than construe a federal statute.

In the case now before this court, the question is an interpretation and validity of a contract.

Thus for the many reasons demonstrated above, the *in rem* action perfected at the outset of this litigation, we submit, should be maintained in and determined by the District Court.

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed and that the cause be remanded to the United States District Court for the Southern District of Texas, Houston Division, for further proceedings.

Respectfuly submitted,

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